

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MURIEL MOSIMANE

(Applicant)

v

COMMISSIONER OF POLICE
SOLICITOR GENERAL

Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice
F.X. Rooney on the 9th day of June,
1980.

On the 17th March, 1980, the petitioner applied to this Court for an order in the nature of a writ of habeus corpus in respect of one Theko Letsie. She said that she was the common law wife of LETSIE with whom she lives at Lower Thamae in the Maseru District. The petitioner alleged that at about 4.00 p.m. in the afternoon of the 10th March, 1980, 3 members of the Criminal Investigation Department came to her shop at Sebaboleng and took away Letsie. She said she was informed that he was required for questioning. She was required to obtain Letsie's passport which she handed over to the police.

On the 11th March, the petitioner accompanied by an attorney saw Letsie at the police charge office where they were informed that he would appear before the Maseru magistrate's court on the 13th March on a charge relating to the unlawful possession of a Lesotho passport. Letsie did not appear before a magistrate on the date expected. The petitioner said that enquiries made by her at the Maseru Police Station failed to establish the whereabouts of her husband.

On the 17th March, I made an order in this matter in the usual form requiring the respondents to produce the body of Theko Letsie on the 20th March, 1980 and there and then to show cause why he should not be released from custody forthwith. This is the usual form of rule nisi issued in these cases. (See the order made by de Villiers C.J. in In Re Willem Kok 1879 Buch 45 at 47). Whatever the form, the substance of the order required the respondents to produce Letsie, or if that was physically impossible to explain where he was. Such a

return, constitutes a good and sufficient return for the object of the proceedings is not punitive but remedial. (Barnardo v Ford, Gossage's case 1892 A.C. 326 and R. v. Secretary of State for Home Affairs, Ex Parte O'Brien 1923 2.KB.361).

On the 20th March by consent of both parties, the rule was extended until the 28th March. Further postponements followed and it was not until the 14th May that the matter was argued on the affidavits before the Court. Although these affidavits revealed a conflict of evidence in certain areas, it was not possible to resolve the matter by hearing oral evidence. On the 1st April Letsie made an affidavit in which he stated that he was detained in Brixton Prison, Johannesburg. These were obstacles to his appearance in this Court as will afterwards appear.

The Crown's answer to the application is in effect a denial that Letsie is whom he pretends to be and an affirmation that he is one Mabongo Sidney Baduza who has no right to reside in Lesotho or to possess a Lesotho passport. I should make it clear at this point that although the identity of the subject of this application is relevant to its proper determination, I am unable to hold on the evidence before me that it has been established one way or the other who the subject is. That question must await the result of the trial of a future action if such is launched. I can only decide upon the lawfulness of the action of the first respondent in having this person arrested and deported by a consideration of the material contained in the affidavits, excluding all matters in dispute. Furthermore, any decision in these proceedings cannot be binding on Letsie or Baduza (if that be his name) as he is not a party, even though he has filed an affidavit in reply to those filed by the respondents.

A further matter to be considered is the nature of the obligation of the respondents to answer a rule of this nature. They must, in my view show that the subject is lawfully detained. Once there is a lawful detention the circumstances of the persons arrest and capture are irrelevant. (Abrahams v. Minister of Justice and other 1963(4) S.A. 542. For the applicant to succeed she must show that the person is unlawfully detained (Bozzoli v. Station Commander John Voster Square 1972(3) S.A. 934, Snyman J. at 939). The converse must also be true and all that is required of the respondents is proof of lawful detention.

In England the remedy and its procedure are more clearly defined and is fortified by statute and special rules of the Supreme Court. A writ is issued and the person to whom it is directed is under a legal obligation to make a formal return. The end of the writ is to return the cause of the imprisonment so that it may be examined in Court whether the party ought to be discharged or not. (Halsbury Third Edition) Vol.II para 83 et seq.).

The truth of a return cannot as a general rule be traversed or impeached by affidavit though matters may be stated on affidavit in confession and avoidance of the facts alleged in the return. (Halsbury supra 89) However, there are statutory provisions in England which enable the judge to proceed to examine into the truth of the facts set forth in the return.

In Lesotho we may regard affidavits filed in opposition to the order sought as analogous to a return made to a writ of habeus corpus in England. If, for instance, the respondent were to claim detention by warrant, the warrant could be examined and the question of its validity and the jurisdiction of the authority which issued it, tested.

The main affidavit in opposition in this case was sworn by Warrent Officer Makutle of the Lesotho Mounted Police. I set out below the material portions of his affidavit

2.

"During or about February 1980 I received certain information to the effect that a certain MABONGO SIDNEY BADUZA of Soweto in the Republic of South Africa had acquired a Lesotho Passport under the name of SAMUEL THEKO LETSIE and that he was staying at Thamae's in Maseru District.

3.

I followed up this information. I made enquiries from the South African authorities regarding the identity of the said MABONGO SIDNEY BADUZA and I obtained from the South African Police Brixton a set of finger-prints and a photocopy of an identity card of the said MABONGO SIDNEY BANDUZA bearing his photograph and personal particulars which showed that he was born at Alexandra in South Africa. I annex hereto marked "A" the said photocopy.

4.

I also went to the Passport Office at Maseru where I obtained and examined certain documents including a completed form of application signed by SAMUEL THEKO LETSIE on the reverse side of which there was a Declaration made by certain SEKHOBE LETSIE to the effect that the said THEKO LETSIE was born at Lekhalaneng in the District of Maseru on the 3rd May, 1948. The Declaration was made before LETLATSA LETLATSA Chief of Qoaling. In addition there was a letter signed by the said SEKHOBE LETSIE to the effect that SAMUEL THEKO LETSIE his younger brother and also a certificate by Chief Letlatsa Letlatsa in support of the application of the said SAMUEL THEKO LETSIE for a Lesotho Local Passport. I annex hereto the said documents marked "B""C" and "D" respectively.

5.

Thereafter I approached LETLATSA LETLATSA, Chief of Qoaling and questioned him about the certificate he had made in support of the application of SAMUEL THEKO LETSIE for a passport. The Chief said he did not really know SAMUEL THEKO LETSIE and had never seen him but that he was persuaded by the said SEKHOBE LETSIE to say that the said SAMUEL THEKO LETSIE was his subject.

6.

Thereupon I approached the said SEKHOBE LETSIE and he admitted having made false statements to the passport officer and to the Chief of Qoaling by saying that the said SAMUEL THEKO LETSIE was his younger brother and that he was born at Lekhalaneng. In fact the said SAMUEL THEKO LETSIE was not his brother and he (SEKHOBE LETSIE) had made a false Declaration in order to help him obtain a Lesotho passport.

7.

Thereafter I confronted the said SAMUEL THEKO LETSIE at his place of work at BEDCO. He insisted that he was SAMUEL THEKO LETSIE born at Lekhalaneng. I told him I had information that he was not in fact SAMUEL THEKO LETSIE and that I was arresting him on suspicion that he had given false information when applying for a local passport. I asked him to produce his passport. He said it was not with him at the time. I then requested his wife to collect the passport and bring it to the CID Office, where I was escorting her husband. She duly complied and I annex hereto photocopies of the material pages of the said passport marked "E". I noted the resemblance between the photos in the said passport and in annexure A hereto.

8.

At the C.I.D. Office I again questioned the said SAMUEL THEKO LETSIE and informed him that the Chief of Qoaling and the said SEKHOBE LETSIE had both admitted to me that they had made untruthful statements regarding his identity in order to help him obtain a passport. He eventually admitted that his name was MABONGO SIDNEY BADUZA

and that he was a citizen of South Africa and not of Lesotho. I thereupon cautioned and charged him with contravention of the relevant section of the Aliens Control Act of 1966 and I obtained his finger prints which I submitted to Major G.T. Rantoa of the Fingerprint Bureau together with the set of finger prints I had received from the South African Police for comparison. I annex hereto marked F the affidavit of Major G.T. Rantoa from which it will be observed that the results of the comparison were positive.

9.

On my instructions NO. 4974 detective trooper Pali obtained sworn statements from chief LETLATSA LETLATSA and from SEKHOBE LETSIE copies of which I annex hereto marked "G" and "H" respectively.

10.

I submitted my report and the Police docket in the case against MABONGO SIDNEY BADUZA to my superior officers. I was subsequently informed that the matter had been referred to the Ministry of Interior and I was instructed on the 13th March, 1980 to proceed there, obtain an Expulsion Order and execute it. On the same day I duly obtained the Expulsion Order, a copy whereof is annexed hereto marked I. I served it on the said MABONGO SIDNEY BADUZA and obtained his signature on the original and the copy. I thereupon escorted the said MABONGO SIDNEY BADUZA to the Maseru Border post and there handed him over to the South African Police who made an endorsement on Annexure I herein to the effect that they had received him."

Attached to the affidavit are the various annexures therein described.

Concerning the alleged resemblance between the two photographs, I remain unpersuaded. The allegation that the fingerprints of Letsie and Baduza are the same is presented in a manner that leaves much to be desired. There is no proof that the fingerprints supplied by the South African Police were in fact those of Baduza. Major Rantoa compared those fingerprints with others said to be, but, not proved to be, those of Letsie. In the absence of evidence as to where and by whom the two sets of fingerprints were obtained it is not possible to draw any conclusion.

The Expulsion order exhibited was made on the 13th March by the Minister of the Interior "in terms of Section 5 (3) as read with Section 25 of the Aliens Control Act(10 of 1966)".

Section 2(1) of the Aliens Control Act defines an alien as a person who is not a citizen of Lesotho. Section 5(1) declares that no aliens shall enter Lesotho or be or remain there for the purpose of permanent residence. The section goes on to provide for the indefinite and temporary sojourn of aliens and for visitors. Section 6 deals with permits to be issued to aliens for such purposes.

Section 25(1) (2) (3) and (8) read:-

- "(1) Subject to the provisions of sections thirty-eight and thirty-nine, the Minister may make an order that an alien whose presence within Lesotho is unlawful shall be expelled from and remain out of Lesotho either indefinitely or for a period to be specified in the order.
- (2) An order made under this section shall be carried into effect in such manner as the Minister may direct.
- (3) An alien against whom an order is made under this section may, if the Minister so directs, be kept in prison or in police custody while awaiting expulsion and while being conveyed to the place of departure, and while he is so kept he shall be in lawful custody.
- (8) If an alien is brought before a court and the court is informed that an application to the Minister for an order under this section in respect of that alien has been, is being, or is about to be made, the court may direct that that alien be detained in police or prison custody for any period not exceeding fourteen days pending a decision whether or not an order under this section shall be made against him, and while he is so detained he shall be in lawful custody."

The Minister has power to order the deportation of any person who is not a citizen of Lesotho. That authority is not Letsie in his affidavit is the issue of his citizenship. challenged in these proceedings. What is raised by Letsie contends that the Minister has no power to act against him under Section 25 because he is a citizen of Lesotho. These proceedings which began as an application for an interdictum de homine libero exhibendo, have been turned into a question of identity and citizenship. These matters cannot be determined in this application.

In his affidavit sworn at Johannesburg on the 1st April Letsie states that he is the holder of a valid passport 158836 issued by the Government of Lesotho on the 11th October, 1979. That is not disputed. He goes on to allege that while in police custody he was not questioned about his passport. He avers that at the Maseru Police Station he saw members of the South African Police. He alleges that

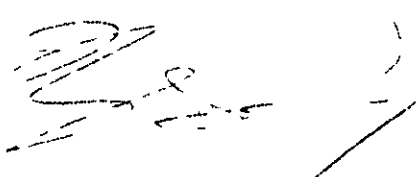
he was taken over the Maseru Bridge to South Africa in the boot of a car. He was assaulted by the South African Police and forced to sign a document which he has since ascertained was an expulsion order from Lesotho. He denies that he admitted to any member of the Lesotho Police that his real name was Mabongo Sydney Baduza.

There is endorsed on the expulsion order the words "To-day the 13th March, 1980, I Mabongo Sydney Baduza has been expelled from Lesotho". It is signed "Sydney Mabonga Baduza and the name Letsie does not appear at all on the document.

The purport of the affidavit in reply is that there was an illicit conspiracy between members of the Lesotho and South African Police with the connivance of the Minister of Interior to deport a Lesotho citizen for trial and punishment in South Africa, notwithstanding the absence of an extradition treaty between the two countries. The opportunity has been taken to raise new issues in this case.

Nowhere in his affidavit does Letsie deny that he is Baduza. He merely denies admitting to any member of the Lesotho Police that Baduza is his real name. He does not say if he ever used the name Baduza in the past. He does not deny or disassociate himself from the identity card attached to the affidavit of W/O Makutle. He makes no comment upon the allegation that Sekhobe Letsie denies that he is his younger brother.

The onus is on the applicant to establish that the arrest detention and deportation of Letsie constituted an unlawful infringement of his personal liberty. In answer to her allegations the respondents have explained the action taken against the person known to the applicant as Letsie. It has not been shown that Letsie is in fact a Lesotho citizen and that, in consequence, the Minister's expulsion order was invalid. It follows that the rule obtained here on the 17th March must be discharged with costs to the respondents.



F.X. ROONEY

9th June, 1980.

For Appellant : Mr. Liebowitz,
For Respondents: Mr. Tsotsi.